

STATE OF SOUTH CAROLINA)	BEFORE THE CHIEF PROCUREMENT
COUNTY OF RICHLAND)	OFFICER FOR CONSTRUCTION
)	
IN THE MATTER OF: CONTROVERSY)	
)	
GRADUATE SCIENCE)	ORDER ON MOTION
RESEARCH FACILITY)	FOR SUMMARY JUDGEMENT
)	
STATE PROJECT H27-9751-AC)	POSTING DATE: April 21, 2003
)	

This matter is before the Chief Procurement Officer for Construction (CPOC) pursuant to a motion for summary judgment from the University of South Carolina (USC), which motion arises from a request for an administrative review submitted by M.B. Kahn Construction Co. (Kahn), under the provisions of §11-35-4230 of the South Carolina Consolidated Procurement Code (Code), of a contract controversy concerning damages allegedly incurred primarily by Atlantic Coast Mechanical, Inc. (ACM) on the Graduate Science Research Facility Project (the Project). ACM was a subcontractor to Kahn, the General Contractor for the Project. The motion was filed on August 5, 2002. A hearing on the motion was held on September 12, 2002. Representing USC was Henry P. Wall, Esq. Representing ACM was Duvall W. Spruill, Esq. Representing Kahn was Robert T. Strickland, Esq.

After the motion hearing was held, the CPO, in a letter to the parties dated December 18, 2002, [Exh. 6] asked the parties to submit briefs regarding whether ACM is a real party in interest.

FACTUAL BACKGROUND

On April 21, 1997, Kahn entered into a contract with USC for construction of the Project. [Exh. 7] On June 9, 1997, Kahn subcontracted plumbing and mechanical work to ACM.¹ During the course of the Project there arose numerous disputes among the parties concerning allegedly defective work by Kahn and ACM and allegedly defective plans and specifications provided by USC. In April of 1999, ACM submitted documentation to Kahn for eight specific claims. Kahn forwarded these claims to USC's representative for evaluation. [Exh. 8] In September of 1999, ACM revised its documentation to state 14 claims (including the previous eight items) for a total value of \$228,000.00. [Exh. 9] The parties attempted to resolve these claims amongst themselves, but were not wholly successful. On December 10, 1999 Kahn and ACM entered into a negotiated written Agreement Regarding Pursuit of Claim and Covenant Not to Sue [Exh. 1]. On December

20, 1999, ACM submitted a request to Kahn stating there existed an impasse in the informal settlement talks with USC and requesting Kahn to petition the CPOC for an administrative review of the remaining ACM claims. Kahn submitted the request for resolution to the CPOC on December 21, 1999. [Exh. 2] Kahn further outlined the disputed issues by letter dated January 27, 2000. [Exh. 11] In accordance with §11-35-4230(3) of the Code, a period of formal mediation by the Office of State Engineer ensued but was not fully successful. By letter dated January 9, 2002, the CPOC scheduled a hearing for April 23rd and 24th to review Kahn's Request for Resolution of December 21, 1999. [Exh. 12] On January 11, 2002, ACM submitted a large volume of material characterized as:

"...supporting information regarding [ACM's] claims on this project and a request for resolution. [ACM] is the real party in interest." [Exh. 5] (emphasis added)

Further attempts at mediation of the issues outlined in the material submitted by ACM on January 11, 2002 [Exh. 13], but thus far the efforts have proved unavailing. [Exh. 14]

DISCUSSION

The CPOC is presented with two legally distinct requests for resolution, yet both are grounded on the same underlying claims. Kahn filed a request for resolution on December 21, 1999. On January 11, 2002 ACM submitted a separate document accompanied by a cover letter asserting it was submitting a request for resolution as the "real party in interest." This is not mere verbiage. The CPOC interprets ACM's actions to be a clear attempt to substitute itself for Kahn in the original matter before the CPOC, relying on the assertion that ACM is the "real party in interest." Before addressing the merits of the motion for summary judgement, it is first necessary to resolve three more fundamental issues.

Subject Matter Jurisdiction, Sovereign Immunity and Real Party in Interest

Subject Matter Jurisdiction

Because the CPOC cannot act without subject matter jurisdiction, the initial question presented is whether the CPOC has jurisdiction over this matter. A court has subject matter jurisdiction over

¹ The actual subcontract between Kahn and ACM was not produced by either party as part of this hearing.

an action if it has authority and power over such an action.² The concept of subject matter jurisdiction is equally applicable to the administrative process.³ Boards, commissions, agencies, and administrative officers only have subject matter jurisdiction over a matter if they are granted such authority by statute or regulation.⁴

The statute applicable to Kahn's original request for resolution is §11-35-4230. This section grants the appropriate chief procurement officer exclusive subject matter jurisdiction over any dispute within its ambit.⁵ On its face, §11-35-4230 limits the CPOC's authority over disputes to disputes arising under or by virtue of a contract between the State and the party requesting resolution of the controversy. More importantly, §11-35-4230 also limits a CPO's authority over subcontractor disputes to only those involving a subcontractor that is a real party in interest.

*This section applies to controversies between the State and a contractor **or subcontractor when the subcontractor is the real party in interest**, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or rescission. The procedure set forth in this section shall constitute the exclusive means of resolving a controversy between the State and a contractor or subcontractor concerning a contract solicited and awarded under the provisions of the South Carolina Consolidated Procurement Code.*

S.C. Code Ann. §11-35-4230(1) (West Supp. 2002) (emphasis added).

Sovereign Immunity

The issue of whether ACM, as asserted in the January 11, 2002 submission, is the real party in interest also determines whether ACM's claim is barred by the doctrine of sovereign immunity. While not a bar to the CPOC's subject matter jurisdiction,⁶ the defense of sovereign immunity is a

² Washington v. Whitaker, 451 S.E.2d 894, 898 (S.C. 1995) ("[S]ubject matter jurisdiction is met if the case is brought in the court which has the authority and power to determine the type of action at issue.").

³ Livingston Manor, Inc. v. Department of Social Services, 809 S.E.2d 153, 155 (Mo. Ct. App. 1991) ("If an administrative agency lacks statutory power to consider a matter, the agency is without subject matter jurisdiction."); 73A C.J.S. *Public Administrative Law and Procedure* § 117 (1983) ("A public administrative body has such adjudicatory jurisdiction as is conferred on it by statute; and, generally, an administrative body has jurisdiction of a proceeding where it is dealing with a controversy of the kind which it is authorized to adjudicate, and it has the parties before it."); and 2 Am. Jur. 2d *Administrative Law* § 274 ("Jurisdiction' in regard to administrative agencies generally may be defined as power given by law to hear and decide controversies.").

⁴ South Carolina Tax Commission v. South Carolina Tax Board of Review, 299 S.E.2d 489 (S.C. 1983).

⁵ Unisys Corp. v. South Carolina Budget and Control Board, 551 S.E.2d 263, 270 (S.C. 2001) (finding § 11-35-4230 an exclusive grant of jurisdiction to the CPO).

⁶ Washington v. Whitaker, 451 S.E.2d 894, 898 (S.C. 1995) (ruling that sovereign immunity is not a jurisdictional bar).

complete defense.⁷ A state can only be sued in a manner and upon such terms as expressly allowed by law.⁸ Section 11-35-4230 is just such a law, and it must be strictly construed.⁹

Real Party In Interest

"The real party in interest is the one who has the right sought to be enforced under the substantive law."¹⁰ Merely because one may benefit by the result of litigation does not make him a "real party in interest"¹¹. In a contract action, the real parties in interest are, as a general rule, the parties to the contract.¹² On the face of the documents,¹³ [Exh. 3 and 4] ACM is not a party to the contract, and under South Carolina law, ACM – which lacks privity of contract with USC – has no substantive right under the common law of contracts to bring an action against USC.¹⁴ Accordingly, ACM is not the real party in interest¹⁵.

⁷ Jinks v. Richland County, 563 S.E.2d 104, 107 (S.C. 2002) ("As a matter of sovereignty, the State has the authority to determine whether it consents to suit within its own court system."); and Melton v. Crowder, 452 S.E.2d 834, 835 (S.C. 1995) ("A State is immune from suit unless it expressly consents to be sued.").

⁸ Unisys Corp. v. South Carolina Budget and Control Board, 551 S.E.2d 263, 270 (S.C. 2001) (With reference to Section 11-35-4230, ruling that "the State can be sued only in the manner and upon the terms and conditions prescribed by the statute.").

⁹ Unisys Corp. v. South Carolina Budget and Control Board, 551 S.E.2d 263, 270 (S.C. 2001) (finding that Section 11-35-4230, as a statute waiving the State's immunity, must be strictly construed) and Watford v. South Carolina Highway Department, 257 S.E.2d 229, 230 (S.C. 1979) (finding that statutes in derogation of sovereign immunity must be strictly construed).

¹⁰ James F. Flanagan, South Carolina Civil Procedure 141 (2nd ed. 1996) (citing Glenn v. E.I. DuPont de Nemours & Co., 174 S.E.2d 155, 157-58 (1970) ("A civil action may be maintained only in the name of a person in law, an [sic] entity, which the law of the forum may recognize as capable of processing and asserting a cause of action.")). See generally Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure §1543 ("In order to apply Rule 17(a) properly, it is necessary to identify the law that created the substantive right being asserted by plaintiff.").

¹¹ See 6A Fed. Prac. & Proc. Civ.2d §1543, citing Armour Pharmaceutical Co. v. Home Ins. Co., 60 F.R.D. 592 (Ill. 1973).

¹² See Dagle Construction Co. v. Cerrati, 262 S.E.2d 12 (S.C. 1980) (for lack of status as a real party in interest, dismissing case brought by corporation when the owner of the construction company, not the company itself, was the party to the contract at issue).

¹³ See, University of South Carolina's Motion for Judgement as a Matter of Law, page 5 and Memorandum of Atlantic Coast Mechanical in Opposition to the University of South Carolina's Motion for Judgement as a Matter of Law, page 7.

¹⁴ Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (denying subcontractor's contract claim against state because subcontractor lacked privity of contract with the state) and Railroad Co. v. Railroad Co., 9 S.C. 325, 329, 9 Richardson 325, 325, 1878 WL 5400, *3 (1878) ("Wherever redress is sought for an injury, arising out of the breach of a contract, whether the action be conceived in form ex contractu or ex delicto, some privity of contract must limit the range of a plaintiff in seeking those who are liable to him.") (quoting Gray v. Ottolengui, 46 S.C.L. 101, 12 Rich. 101, 1859 WL 4326 (S.C.App.L. Jan Term 1859)).

¹⁵ The CPOC notes the curious timing of the actions of Kahn and ACM, which the CPOC interprets to undermine ACM's argument that it is "the real party in interest". The Agreement [Not to Sue] was signed on December 10, 1999. On December 20, ACM petitioned Kahn to file a request for resolution with the CPOC. If ACM truly possessed, in its own mind, the right to pursue a claim directly with USC, either independently pursuant to ACM's interpretation of the statute or by assignment from Kahn, such a request would have been unnecessary. Conversely, if Kahn believed that by executing the Agreement, it had assigned all rights and obligations for the claim to ACM, Kahn would logically have instructed ACM to proceed according to the terms of the Agreement just executed.

The United States Court of Appeals for the Fifth Circuit reached a similar conclusion in Farrell¹⁶. In that case, Jefferson Parish (Parish) hired Farrell Construction Co. (Farrell) as general contractor to build two pump stations. Farrell hired Emile Babst and Company (Babst) as its mechanical subcontractor. When the project suffered from significant delay, Farrell and Babst claimed that Parish had provided defective plans and specifications. Litigation ensued, but only after Farrell and Babst had entered into a "prelitigation agreement." In that agreement, Farrell and Babst agreed that Farrell would pursue both its and Babst's claims against Parish and that Babst share of any recovery would satisfy all its claims against Farrell. Farrell filed suit, seeking to recover delay damages for itself and extra work charges for Babst. Farrell's complaint stated that Farrell was recovering "for the account of Babst." Due to issues regarding federal diversity jurisdiction which are irrelevant here, the court directly addressed whether Babst was a real party in interest in the dispute with Parish. Because, in the absence of privity of contract, the applicable substantive law did not provide Babst with any "enforceable substantive contract rights against the Parish," the court concluded that Babst was not a real party in interest. In other words, because Babst was a subcontractor, it lacked any right to sue Parish on the contract and, thus, was not a real party in interest to the action against Parish on the contract.

As noted above, South Carolina law is in accord with this analysis. Accordingly, the CPOC concludes that ACM is not a real party in interest¹⁷. Because it is not a real party in interest, ACM'S January 11, 2002 claim does not fall within §11-35-4230's limited waiver of sovereign immunity and the CPOC lacks subject matter jurisdiction. Accordingly, the matter of ACM's January 11, 2002 Request for Resolution is dismissed. Given the history of this matter, ACM's central role in the underlying dispute and ACM's apparent right to proceed on Kahn's behalf¹⁸, the CPOC believes the materials submitted by ACM may be considered as additional clarification of Kahn's Request for Resolution, assuming the material was timely filed.

The only matter before the CPOC is the December 21, 1999 Request for Resolution submitted by Kahn and USC's Motion for Summary Judgement.

¹⁶ See Farrell Construction Co. v. Jefferson Parish, 896 F.2d 136 (5th Cir. 1990)

¹⁷ The CPOC recognizes that §11-35-4230(1) cannot and should not be construed into a nullity. The statute clearly intends to afford subcontractors a limited avenue for redress. However, to avail themselves of this limited right of action, subcontractors must acquire the status of "real party in interest" as defined in South Carolina law. SCRCP 17(a) offers illustrative examples of such status and there may well be others, but the CPOC believes the most appropriate option for a subcontractor is that of an assignee of the General Contractor.

¹⁸ See Exhibit 1, ¶4, "To the extent required by law, M.B. Kahn...authorizes ACM to pursue ACM's claim through the use of M.B. Kahn's name."

Substantive Issues

USC's Motion is directed at ACM's Request for Resolution, which has been dismissed for lack of jurisdiction. Ordinarily, once a matter is dismissed for lack of subject matter jurisdiction, nothing more should be said.¹⁹ However the CPOC recognizes that Kahn's claim is still pending; that the Procurement Review Panel (in the event of an appeal) might disagree with the CPOC on the issue of jurisdiction; and that the issues underlying USC's Motion would be as just as applicable to the Request by Kahn as they were to ACM's Request. Accordingly, the substantive matters raised by USC's Motion are addressed.

Can ACM Pursue Kahn's Claims Against USC For Damages That ACM Suffered Even If ACM Has Released Kahn From Any Liability For Those Damages?

In seeking to have summary judgement entered against ACM, USC argues as follows: Because ACM is asserting a claim that belongs to Kahn,²⁰ ACM can only recover damages that Kahn could recover. Kahn can only recover damages suffered by ACM if Kahn has paid for or is liable for those damages. Because ACM has released Kahn of all liability for injuries arising out of the project, Kahn is no longer liable to ACM for damages suffered by ACM that arise out of the project. Accordingly, ACM's derivative claim cannot include damages arising out of the project that were suffered by ACM.

Boiled down, the essential question²¹ is whether a subcontractor can pursue the prime contractor's claims against the owner for damages the subcontractor suffered even though the subcontractor has released the prime contractor from any liability for those damages. The short answer is "No".

¹⁹ Triska v. Department of Health and Environmental Control 355 S.E.2d 531 (1987) (ruling that any action taken by an administrative agency outside of its statutory and regulatory authority is null and void) and Eagle v. Global Associates, 356 S.E.2d 417, 419 (S.C. Ct. App. 1987) ("When a court is without jurisdiction of the subject matter, any action with respect to such a cause, other than to dismiss it, is absolutely void.") (citing Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978)).

²⁰ All parties agree that ACM's claims are "derivative" claims, i.e., ACM is asserting only those claims that Kahn, as the prime contractor, could have asserted against USC, as the owner. Memorandum in Support of the University of South Carolina's Motion for Judgment as a Matter of Law, at p. 6 ("ACM has asserted no other theories by which the Owner would have any obligation or duty to ACM other than as a derivative claim under the general contract.") and Memorandum of Atlantic Coast Mechanical in Opposition to the University of South Carolina's Motion for Judgment as a Matter of Law, at p. 7 ("The University argues that ACM's claim against it is a derivative claim, and ACM does not dispute this point."). As an aside, characterizing subcontractor claims as "derivative" is a misnomer. §11-35-4230 requires that, in order to pursue a claim, a subcontractor must be the real party in interest. "The real party in interest is the one who has the right sought to be enforced under the substantive law." James F. Flanagan, South Carolina Civil Procedure 141 (2nd ed. 1996). If substantive law grants a subcontractor an actionable right, the subcontractor's action on that right is not "derivative".

²¹ While the facts of this case implicate other issues, the parties have not raised several important issues that dovetail closely with the issues they did raise. Accordingly, for the purposes of addressing the motion for summary judgment, the CPOC will assume, **without deciding**, that (1) in the absence of any release or discharge between the parties, Kahn

Under the common law of contracts, the subcontractor's derivative claims against the owner are limited to what the prime contractor could itself recover against the owner. It is axiomatic that, as a general rule, a party can only recover for damages suffered by that party.²² If the prime contractor has no liability to the subcontractor for the subcontractor's damages, then the subcontractor's damages are not actual damages of the prime contractor.²³ Applied to the facts at hand, the question becomes whether ACM can pursue Kahn's claims against USC for damages ACM may have suffered even if ACM has released Kahn from any liability for those damages. Again, the answer is "No." Kahn can recover only for those damages for which Kahn is liable. If Kahn has no liability to ACM for project-related damages that were suffered by ACM, then ACM's project-related damages are not damages for which Kahn could recover from USC.

Pursuant To The Kahn-ACM Agreement, Is Kahn Liable To ACM For Project-Related Damages?

As stated above, it is assumed – **without deciding** – that, in the absence of any release or discharge between the parties, Kahn is liable to ACM for any project-related damages that ACM seeks to recover from USC. Accordingly, the question is whether the Agreement Regarding Pursuit of Claim and Covenant Not to Sue (Agreement) [Exh. 1] releases Kahn from liability for those damages. Paragraph 11 of the Agreement states as follows:

For and in consideration of the agreements, promises and other good and valuable consideration recited herein, the sufficiency of which is acknowledged, ACM further covenants and agrees with M. B. Kahn, its employees, officers, directors, shareholders, affiliates, subcontractors, suppliers, laborers, successors and assigns (hereinafter referred to collectively as the "Released Parties"), to forever refrain and desist from instituting, prosecuting or asserting against the Released Parties any claim, demand, action, or suit of whatsoever kind or nature, resulting from or in any way related to the Project. This covenant includes and applies to, but is not limited to, all claims which are included in the Claim described in this Agreement.

Agreement, at p.11 (emphasis added).

is, on some theory, liable to ACM for the damages ACM seeks to recover from USC, and (2) that ACM has a right to pursue Kahn's claims against USC, i.e., ACM can recover on a derivative claim.

²² South Carolina Finance Corp. v. West Side Finance Co., 236 S.C. 109, 113 S.E.2d 329, 335 (1960) ("The measure of damages for breach of contract is the loss actually suffered by the contractee as the result of the breach.").

²³ Severin v. United States, 99 Ct. Cl. 435 (1943) ("If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiff, and sustain their suit."); Walter Kidde Constructors, Inc. v. State, 434 A.2d 962, 971 (Conn. 1981) ("[P]roof of the liability of the prime contractor to the subcontractor is a prerequisite to recovery by the prime contractor for an injury alleged to have been sustained by the subcontractor."); and W.G. Yates & Sons Construction Co. v. Caldera, 192 F.3d 987, 991 (Fed. Cir. 1999) ("[I]f the prime contractor is liable to the subcontractor for damages sustained by the subcontractor, that prime

On its face, this paragraph, which bars ACM from asserting any claim against Kahn (a "released" party) that relates to the Project in any way, unambiguously releases Kahn from any liability to ACM for project-related damages. As discussed above, ACM, in pursuit of its derivative claim, cannot recover any damages from USC for which it has released Kahn. Having released Kahn for any project related damages, ACM cannot now seek to recover damages from USC for which it has released USC's prime contractor, Kahn.

In defense, ACM cites to other paragraphs of the Agreement to preserve the requisite liability.²⁴ According to the Agreement, Kahn (1) authorizes ACM to pursue ACM's claim [¶4]; (2) agrees to sponsor ACM's claim [¶4]; (3) authorizes ACM to use Kahn's name in pursuit of ACM's claim [¶4]; (4) agrees to cooperate in the presentation of ACM's claim [¶5 and ¶7]; (5) grants ACM exclusive rights to prosecute, settle, and release ACM's claim [¶6]; (6) grants ACM the right "to be paid the entire amount of the proceeds, if any, from ACM's Claim [¶7]; and (7) agrees to pay ACM any payment Kahn receives from USC "on ACM's claim" [¶9]. Essentially, ACM argues that Kahn's contingent liability to pay ACM for any payment it receives on ACM's claim is sufficient.²⁵

In making this argument, ACM relies on a series of rules – collectively called the Severin Doctrine²⁶ – applied by the Federal courts in the context of government contracts. Under these cases, the courts have effectively dispensed with any concern regarding whether the prime contractor is actually liable to the subcontractor. Rather, the courts have developed rules such that a simple agreement²⁷ by which a prime contractor agrees to pay a subcontractor when the prime is

contractor can bring an action against the government for the subcontractor's damages."). See generally 17B C.J.S. Contracts § 2 (1999) ("Generally, only a party to a contract or one in privity may enforce it.").

²⁴ Memorandum of Atlantic Coast Mechanical in Opposition to the University of South Carolina's Motion for Judgement as a Matter of Law, at p. 2.

²⁵ Memorandum of Atlantic Coast Mechanical in Opposition to the University of South Carolina's Motion for Judgement as a Matter of Law, at p. 7.

²⁶ The Severin Doctrine gets its name from the opinion in Severin v. United States, 99 Ct. Cl. 435 (1943). The opinion in W.G. Yates & Sons Construction Co. v. Caldera, 192 F.3d 987, 990-91 (Fed. Cir. 2000) presents a concise overview of the Severin Doctrine. The opinion in E.R. Mitchell Construction Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999) presents an overview of how the doctrine as "evolved" since the Severin case was decided. An excellent article, often cited by the cases, is Henry R. Kates, Facilitating Subcontractors' Claims Against the Government Through the Prime Contractor as the Real Party in Interest, 52 Geo. Wash. L. Rev. 146 (1983). At least two notable authors have advocated that the federal government abandon the rule stated in the Severin case. Ralph C. Nash & John Cibinic, Subcontractor Claims Against the Government: A Fragile Process 13 Nash & Cibinic Report 20 (April 1999). However, they recommend abandoning the need for privity of contract, thus allowing a subcontractor to simply sue the government directly for breach of contract. Whatever the merits others may find in this suggestion, it does not reflect South Carolina law. See Bob Hammond Const. Co. v. Banks Const. Co., 312 S.C. 422, 440 S.E.2d 890 (Ct. App. 1994) (denying subcontractor's contract claim against state because subcontractor lacked privity of contract with the state) and S.C. Att'y Gen. Op. No. 91-5 ("The subcontractor contracts not with the State but, rather, with the prime contractor. There would generally be no privity of contract between the State and a subcontractor...").

²⁷ Such agreements are often called liquidation agreements, and in the federal arena, they appear to be ubiquitous. See generally Carl A. Calvert & Carl F. Ingwalson, Jr., Pass Through Claims and Liquidation Agreements, Construction

paid will preserve sufficient liability to allow the prime contractor to claim damages incurred by the subcontractor as the prime contractor's own damages.²⁸

Simply put, the CPOC does not believe these cases represent the law in South Carolina. The CPOC was unable to find any case that adopts such a rule for private construction contracts and doubts whether a South Carolina court would hold an owner – public or private – liable to a subcontractor solely because the prime contractor agreed to pass any recovery along to the subcontractor. A review of the relevant cases and literature is instructive. They reflect that the simple decision reached in the Severin opinion has been twisted far beyond its simple roots in basic contract law.²⁹ In a relatively recent case,³⁰ the United States Court of Federal Claims acknowledged as much.

Of course, the "liability" presumed in Simmons is, under current practice, a mere fiction. In fact, the contractor is exposed to no liability because in most of these cases, including this, only the subcontractor's own attorneys actually prosecute the suit, at the subcontractor's sole expense, and the contractor is not even exposed to liability for a false certification since it is permitted to qualify its certification of the claim under the CDA by relying on the subcontractor's representations. Thus, if the contractor lends his name to the suit, there is no set of circumstances for which the contractor can be monetarily liable.

The issue actually decided by the Severin court was simple; if the prime contractor has no liability to the subcontractor for the subcontractor's damages, then the subcontractor's damages are not actual damages of the prime contractor.³¹ Decades later, the federal courts have, in the area of federal government contracts, developed a "doctrine" that bears little resemblance to the basic issue decided in Severin. The CPOC sees no reason to adopt this set of federal rules for South Carolina.

DECISION

It is the decision of the CPOC that ACM is not a "real party in interest" as required by §11-35-4230 of the Code. Because it is not a real party in interest, ACM'S January 11, 2002 claim does

Lawyer, October 1998, at 29 and Martin Healy, Subcontractor Claims: Strategies for the Prime, 95-07 Briefing Papers 1 (June 1995).

²⁸ E.g., Kentucky Bridge & Dam, Inc. v. United States, 42 Fed. Cl. 501, 524 (1998) (providing an excellent overview of the disjointed rules characterized as the Severin doctrine).

²⁹ The cases cited herein, especially the overview in Kentucky Bridge & Dam, Inc. v. United States, 42 Fed. Cl. 501, 524-25 (1998), and the cases cited by the parties in their briefs, effectively illustrate this point.

³⁰ Kentucky Bridge & Dam, Inc. v. United States, 42 Fed. Cl. 501, 524-25 (1998) (quoting George Hyman Construction Co. v. United States, 30 Fed. Cl. 170, 176 n.11 (1993)) (citations omitted) (emphasis added).

not fall within §11-35-4230's limited waiver of sovereign immunity and the CPOC lacks subject matter jurisdiction over this matter. Accordingly, the matter of ACM's January 11, 2002 Request for Resolution is dismissed.

For reasons already explained, the CPOC concludes that ACM can only pursue whatever claim Kahn could have pursued. The CPOC finds that, with clear and unambiguous language, ACM has effectively released Kahn from any liability for ACM's claim against USC. Accordingly, ACM cannot seek to recover from USC for the damages it suffered with regard to the project.³² The CPOC specifically rejects the position of ACM that Kahn's obligation to act as a conduit for the disbursement of any funds received from USC is sufficient to create the liability necessary to maintain ACM's right to pursue a claim. Accordingly, the motion for summary judgment is GRANTED.

IT IS SO ORDERED

A handwritten signature in black ink, reading "Michael M. Thomas". The signature is written in a cursive, flowing style. Below the signature is a solid horizontal line.

Michael M. Thomas, PE, CBO
Chief Procurement Officer for Construction

April 21, 2003
Date

³¹ Severin v. United States, 99 Ct. Cl. 435 (1943) ("If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiff, and sustain their suit.").

³² Conceivably, ACM might be able to recover whatever damages Kahn actually suffered, if any.

STATEMENT OF THE RIGHT TO APPEAL

The South Carolina Procurement Code, under Section 11-35-4230, subsection 6, states:

A decision under subsection (4) of this section shall be final and conclusive, unless fraudulent, or unless any person adversely affected requests a further administrative review by the Procurement Review Panel under Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review shall be directed to the appropriate chief procurement officer who shall forward the request to the Panel or to the Procurement Review Panel and shall be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person may also request a hearing before the Procurement Review Panel.

NOTE: Pursuant to Proviso 66.1 of the 2002 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel [filed after June 30, 2002] shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2002 S.C. Act No. 289, Part IB, § 66.1 (emphasis added). PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."